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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LUPE CASTRO CORRALES,

Defendant and Appellant.

F044429

(Super. Ct. No. F03900937-4)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Franklin P. Jones, Judge.

Kenneth R. Carver, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Susan Rankin Bunting, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Vartabedian, Acting P.J., Harris, J., and Gomes, J.

A jury convicted appellant, Lupe Castro Corrales, of second degree burglary (count 1, Pen. Code, § 459), possession of stolen property (count 2, Pen. Code, § 496, subd. (a)), possession of burglary tools (count 3, Pen. Code, § 466), and possession of a hypodermic needle and syringe (count 4, Bus. & Prof. Code, § 4140). In a separate proceeding, Corrales admitted three prior prison term enhancements (Pen. Code, § 667.5, subd. (b)), and allegations that he had a prior strike within the meaning of the three strikes law (Pen. Code, 667, subds. (b)-(i)). On November 13, 2003, the court sentenced Corrales to the aggregate term of nine years as follows: the aggravated term of three years on his burglary conviction, doubled to six years because of Corrales strike conviction, a stayed six-year term on the his possession of stolen property conviction, time served on each of his convictions in counts 3 and 4, and three one-year prior prison term enhancements. On appeal, Corrales contends: 1) the court abused its discretion when it denied his motion to strike his prior conviction; and 2) the court erred in imposing the upper term on his convictions in counts 1 and 2. We will affirm.

### **FACTS**

On February 8, 2003, Fresno Police Officer Hector Becerra was patrolling the parking lot at the Fulton mall when two citizens approached him and reported seeing a Hispanic man breaking into cars in the lot. Officer Becerra went to the second floor of the parking garage and saw Corrales approximately 15 feet away from a car which had the driver's side window broken. Becerra detained Corrales, patted him down, and found three hypodermic needles. In a backpack Corrales was carrying, the officer found more needles, a bolt cutter, screwdrivers, and a car stereo. The stereo was subsequently identified as the one taken from the car with the broken window.

Corrales's probation reports<sup>1</sup> indicate that Corrales had a record dating back to December 1974 when he was 11-years-old and was referred to informal probation for vandalism and petty theft. From 1975 through 1980 he was adjudicated in juvenile court on three counts of burglary, two counts of robbery and one count each of possession of stolen property, illegal entry, escape, paint sniffing, trespassing, and taking a bike without permission. He also had one violation of probation during that time.

As an adult, from 1982 to 1988, Corrales was convicted of three counts of being under the influence of a controlled substance and one count each of possession of a syringe, petty theft, vehicle theft, misdemeanor escape, misdemeanor attempted burglary and first degree burglary. From 1992 through 1998, Corrales was convicted of felony burglary, two counts of possession of drug paraphernalia, and one count each of felony burglary, being under the influence, possession of a hypodermic needle, and possession of cocaine. Corrales also served three separate prison terms, he violated his parole on nine separate occasions, and he committed many of his offenses while on probation. Corrales was last paroled on June 21, 2001.

Corrales's probation reports included a letter from Kathy Grinstead, M.A., from Early Intervention Services in which she noted that, according to Corrales, he was clean and sober while he was in the Renewed Outreach Program for 14 months. However, the program closed its doors in 2002 without prior notice leaving its residents to find an alternative placement on their own. Corrales did not attempt to enroll himself in any other program because he thought he could "do it" on his own and soon relapsed.

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<sup>1</sup> A probation report and supplemental probation report were prepared in the instant case. Each of these reports had attached to it a copy of the probation report and supplemental probation report prepared in relation to Corrales's 1998 conviction for possession of cocaine.

On June 10, 2003, Corrales filed a *Romero*<sup>2</sup> motion asking the court to strike his prior strike conviction.

In July 13, 2003, the court denied Corrales's *Romero* motion and allowed him to withdraw his plea.

On July 11, 2003, a jury convicted Corrales of the previously noted offenses and he admitted the prior conviction allegations and the prior prison term enhancements.

On November 13, 2003, Corrales renewed his *Romero* motion. In refusing to strike Corrales's prior conviction, the court noted that: (1) Corrales had an extensive record dating back to when he was 11-years-old, (2) a nine-year term was a fair sentence in light of Corrales's recidivism and the circumstances of his current offense, and (3) although Corrales was almost 40-years-old, he had not done anything to address his drug addiction. The court then sentenced Corrales to an aggregate term of nine years. In imposing the upper term on counts 1 and 2, the court found as aggravating circumstances, that Corrales's prior convictions were numerous and that his prior performance on parole and probation had been unsatisfactory. The court did not find Corrales's addiction was a mitigating circumstance.

## **DISCUSSION**

### ***The Romero Motion***

“[A] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374. “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a

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<sup>2</sup> *Romero v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

particular sentence will not be set aside on review.” ’ [Citations.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 376.)

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385[,] [subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, Corrales had a lengthy criminal record dating back to 1974 which consisted mainly of theft and drug-related offenses and parole violations. His instant offenses were also theft and drug-related. Further, although it is clear that drugs have played a major part in his criminality, Corrales had been unable or unwilling to address his drug problem. Thus, the record contains evidence that supports the court’s decision not to strike the prior conviction allegations.

Corrales contends the court abused its discretion because his criminal conduct resulted from his addiction, he was motivated to complete a program, and he had shown that he could make good progress if he received help. However, the court could consider that it was not until his 1998 conviction for possession of cocaine, that Corrales obtained treatment for his addiction and that after his drug placement program closed, he apparently did nothing to enroll himself in another program and ultimately reoffended.

Accordingly, we conclude the court did not abuse its discretion when it denied Corrales's request to strike the prior conviction allegations.

### ***Imposition of The Upper Term***

Corrales contends the court could not impose the upper term utilizing aggravating factors that were not found true beyond a reasonable doubt by the jury. This contention is based on the recent United States Supreme Court case of *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348]. In our view, the holdings in *Blakely* and *Apprendi* do not apply when the exercise of judicial discretion is kept within a sentencing range authorized by statute for the specific crime of which the defendant is convicted by jury.

Based on constitutional history, *Apprendi* advises, "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion--taking into consideration various factors relating both to offense and offender--in imposing judgment *within the range* prescribed by statute." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 481.) *Apprendi* instructs further that a "sentencing factor" is distinguishable from a "sentence enhancement": the former is a "circumstance, which may be either aggravating or mitigating in character, that supports a sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense; the latter is "used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id.* at p. 494, fn. 19.)

In *Blakely*, while the sentence was within the indeterminate maximum for the category of the offense (class B felony), the sentenced term exceeded the specific range set by the Washington State statute for the offense; the trial court's excessive term was based on facts not found by the jury and thus constitutionally excessive. (*Blakely v. Washington, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2534].)

Given this backdrop, we find California's determinate sentencing law constitutional and Corrales's present sentence constitutionally permitted. Under this state's determinate sentencing law, each applicable specific offense is given a sentencing range that includes lower, middle, and upper terms. A defendant's right to a jury trial for that offense is with the understanding that the upper term is the maximum incarceration he may be required to serve if convicted of the specific offense for which he faces trial. Should the People allege enhancement charges, those are separately charged and the defendant is entitled to a jury's determination of the truth of such charges.

The determination of the court's choice of term within the particular range allowed for a specific offense is determined after an evaluation of factors in mitigation and aggravation. These sentencing factors, consistent with the definition found in *Apprendi*, are weighed by the sentencing judge in determining the term of punishment within the specific offense's sentencing range. If there are no such factors or neither the aggravating nor mitigating factors preponderate, the court shall choose the middle term; additionally, the court retains the discretion to impose either the upper or middle term where it finds the upper term is justifiable. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 77.) Such an exercise of discretion does not violate the constitutional principles set forth in *Apprendi* and followed in *Blakely* because the court's discretion is exercised within the specific statutory range of sentence.<sup>3</sup>

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<sup>3</sup> Our conclusion finds support in the recent amplification of *Apprendi - Blakely* found in *United States v. Booker* (Jan 12, 2005, No. 04-104) 543 U.S. \_\_\_\_ [2005 WL 50108]. We distill from *Booker* the following refinement for our present purposes: *If a fact necessarily results in a higher sentence, the fact must be admitted by defendant or found by the jury.* Because California's sentencing law vests in the trial court discretion to choose the upper or middle term even where aggravating factors are found which preponderate, the present sentence is constitutionally permitted.

Here, the trial court selected the upper term based upon its analysis of sentencing factors noted above. This choice of term was within the statutory range allowed for the specific offense of voluntary manslaughter. No constitutional violation occurred.

Moreover, even if we found that *Blakely* and *Apprendi* applied to California's determinate sentencing law, we would reject Corrales's claim of error. The reasons the trial court gave for imposing the upper term related to Corrales's prior convictions and their penal consequences: Corrales's prior convictions as an adult and sustained juvenile delinquency petitions were numerous and his prior performance on probation and parole were unsatisfactory. These facts were included in the probation report prepared for sentencing and Corrales did not contest them.

The rule of *Apprendi* and *Blakely* does not apply to the fact of a prior conviction used to increase the penalty for a crime. (*Apprendi, supra*, 530 U.S. at p. 490.) Case law has not flushed out whether other factors relating to the defendant's recidivism fall within the *Apprendi* prior conviction exception. (See e.g., *People v. Vu* (2004) 124 Cal.App.4th 1060, 1069.) However, regardless of whether all of the recidivist related factors the court utilized fell within the prior conviction exception, one valid factor in aggravation is sufficient to expose the defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433). Accordingly, assuming *Blakely* error in relying on poor probation and parole performance in imposing the upper term, such error was harmless in light of Corrales's numerous juvenile court adjudications and adult convictions. (*People v. Emerson* (2004) 124 Cal.App.4th 171, 180.)

### **DISPOSITION**

The judgment is affirmed.